suit, prosecution or other legal proceeding shall lie in any court against any other person for or on account of or in respect of any act done or purporting to have been done by him under any regulation, order, rule, by-law, direction, notice or instruction of any public officer given for any such purpose as aforesaid:

Provided that the act of such officer or person was done in good faith and in a reasonable belief that it was necessary for the purpose intended to be served thereby."

It is clear that under this section no action could be taken against DW(3) or the Government provided that he had acted in good faith and in a reasonable belief that the action was necessary for the purpose intended. The source of this principle is the common law. *Halsbury's* Laws of England, 3rd Edition, Vol. 7 at page 260 says:

"The Crown has the same power as a private individual of taking all measures which are absolutely and immediately necessary for the purpose of dealing with an invasion or other emergency."

It seems a fact that the state of emergency created by the Proclamation in 1969 is still in force. As to the validity of the Proclamation, I need only refer to the case of *Government of Malaysia* v. *Mahan Singh.*[1]

There is no doubt in my view that although DW(3) may have been negligent in what he did, he was certainly not acting in *mala fide* or had no reasonable belief that the action was necessary for the purpose intended. There was no evidence of malice or improper motive which prompted him to do what he did. The deceased were shot because they did not answer to his challenge and consequently he must have imagined that they were the C.T. He might have been careless in what he did but he had acted in good faith and in the reasonable belief that it was necessary for him to act as he did and therefore he had acted within the law. I would, therefore, dismiss the action with costs.

If however I am found to be wrong on the law then I would award damages as follows. There is no evidence by PW(1) as to her husband's age. It seemed agreed by both parties that he was 45. She said he was a Land Scheme settler. He tapped rubber and earned $300 a month and gave her $150 per month. But then she said she did not know how much he earned. PW(2) also gave the same figure of her husband's income and also did not know how much her husband actually earned. But she agreed as a tapper he would get about $2-$3 per day.

At 45 defence counsel said life expectancy is about 13 years. I think this is reasonable considering that in *Kemp & Kemp* life expectancy is even higher. As for the 2nd deceased, counsel reckons the years purchase to be 15 years. This in my view, is fair bearing in mind that in *Maimunah* v. *Abu Bakar*[2] although the deceased was 31, the years purchase was 11 years. For the income I would consider it at $3 per day at the average income of $60 per month. For the 2nd deceased, I would award an income of $70 per month.

There is thus loss of income for the 1st plaintiff of $60 per month at 13 = $9,360. For the 2nd plaintiff there is a loss of income of $70. But the wife was remarried a month before the trial. She said her husband was unemployed. But the husband was not called. I would consider loss of income therefore from the date of incident to the date of trial i.e. for 3 years at $2,520. This would merge with the life expectation at the concentual figure of $3,000. There is no strict proof of the funeral expenses, but I would award nevertheless a sum of $100 each for the 1st and 2nd plaintiff.

There would therefore be general damages to the 1st plaintiff at 50% in the sum of $4,680 and special damages of $100 and costs. There would be general damages to the 2nd plaintiff at 50% in the sum of $1,500 and special damages of $100 and costs. There will be interest at 6% for general damages from the date of issue of writ until judgment.

Action dismissed.

Solicitors: *Wan Mustapha & Co.*

PUBLIC PROSECUTOR v. TAN THO KIM & ORS.

[O.Cr.J. (Abdul Razak J.) December 4, 1976]
[Kuala Trengganu — Miscellaneous Criminal Application No. 3 of 1976]

Criminal Law and Procedure — Filing of notice of appeal within time — Application for notes of evidence — Judgment and notes of evidence inextricably connected — Delivery of judgment without notes of evidence — Court's refusal to deliver notes of evidence — Lapse of period to file petition — Application for extension of period to file petition — Right of applicant to notes of evidence — Criminal Procedure Code (F.M.S. Cap. 6), s. 307(5).

Criminal Law and Procedure — Notes of evidence — Right of applicant to — Criminal Procedure Code (F.M.S. Cap. 6), s. 307(5).

The accused were charged for an offence under the Prevention of Corruption Act for which they were acquitted and discharged by the President, Sessions Court on July 16, 1976. The applicant then filed his notice of appeal on July 12, within the required time. Pursuant to section 307(5), Criminal Procedure Code, he applied for the notes of evidence. The grounds of judgment were delivered to him but without the notes of evidence. On the 21st, before the period for filing the petition lapsed, the applicant wrote to the court asking why the notes were not delivered. On the date on which the time for filing lapsed, the President, Sessions Court wrote to the applicant to say why the court chose not to comply with his request. He explained that there was no purpose in supplying the notes when they had already been supplied earlier during the course of the trial. The applicant then applied for an extension of time to file the notice of appeal.

Held: (1) one of the essential purposes if not requirement of an appeal is that the parties and counsel alike should be placed in a position as to be able to present their case as fully and effectively as possible. This object would naturally be defeated and hence justice denied if the presiding officer should seek to dismember part or parts of the usual record against the wish of the party concerned;

(2) the right of the applicant to ask for the notes of evidence is one of law. He has not by his conduct sought to waive it. Since therefore he had not lost his right and the notes were not made available to him since filing his notice, the time for filing his petition had not lapsed.

Case referred to:-

(1) *Chapman* v. *Michaelson* [1908] 2 Ch. D. 612.

CRIMINAL APPLICATION.

Edgar Joseph for the 1st respondent.

Lee Leng Guan for the 2nd respondent.

Porres P. Royan for the 3rd respondent.

Abdul Razak J.: This is an application for an

extension of time to file the notice of appeal. The accused the subject matter arising out of which this application was made were charged for an offence under the Prevention of Corruption Act for which they were acquitted and discharged by the learned President on July 6, 1976. The applicant then filed his notice of appeal on July 12, within the required time. In addition he also exercised his right pursuant to Section 307(5) of the Criminal Procedure Code to ask for the notes of evidence. The grounds of judgment were then duly delivered to him but without the notes of evidence. It is not clear when the grounds were actually sent but the letter was dated the 12th of October. In the normal course of event it would have probably reached the applicant on the 15 if it was posted on the 12 itself. The last date for filing the petition would have fallen on October 25 or 26. On the 21, before the period lapsed the applicant wrote to the court asking why the notes were not delivered. A conversation apparently then followed in which the applicant indicated to the Registrar Sessions Court that he was only interested in having the prosecution submission and the President's oral judgment which it seemed he read out in open court. The applicant then followed this with a letter which was tendered on the day of this application. All this apparently took place in the interim period before the time for filing the petition had lapsed. Evidently this intermission, as far as the applicant was concerned, came really to nothing because the court did not see his point of view and did not comply with his request. In the meantime time was running against him, as indeed it did because by letter on October 25 which probably reached the applicant on the 28 or the 29, the Registrar finally informed the parties concerned that the time for filing the petition had lapsed and therefore the appeal was deemed to have been withdrawn. On the even date which ironically was the date when the time for filing had lapsed the President wrote to the applicant to say why the court chose not to comply with his request. He explained that there was no purpose in supplying the notes when they had already been supplied earlier during the course of the trial. He also said that the submissions and oral judgment were not part of the notes of evidence. He however, nevertheless, enclosed the prosecution submission including the notes of his oral judgment. Why this was done on a date which the President knew perfectly well to have lapsed for the purpose of filing the petition, I scarcely know. Clearly he was not bound to give any explanation to the applicant. On the other hand, if he wanted to assist it would have been useful, I thought, if the explanation was done before the applicant's time was up so as to enable him to readjust his position if necessary and swiftly file his petition instead of leaving him to argue matters out with the lay Registrar. Probably the President was trying to give a few odd lessons to the applicant on how things should be done and what the notes of evidence should mean next time. Anyway, the matter is now before me with a strong plea by the applicant that he had done all that was expected of him and it was only and through a misunderstanding between the court and him as to whether the notes included the submission and the oral judgment that he is seemingly now being thrown out of court and out of the cycle of time for ever.

I suppose in the context in which the procedure is strictly construed by the President he was perfectly right in sticking to his ground to say he would deny the applicant his request, although it seemed rather strange to me why in this particular case a Presiding Officer should suddenly grudge to spare the necessary documents where it has always been taken for granted that they would be included in the notes. From my own experience the submission as well as the oral judgment if any, have all along been so traditionally part and parcel of the notes of evidence that I imagine they have almost acquired the force of law if not of procedure. The one is so inextricably connected with the other that without the one the other is virtually limbless. The notes without the submission is as bad as having the submission without the notes. The oral judgment if made would normally accompany the written judgment. It generally merely gives a sketchy or brief outline of the reasons. In the instant case apparently it was more than just an outline. Whatever it is they have always been an inseparable part of the notes. I see this is the practice even among lay Collectors of Land Revenue and others who merely exercise quasi-judicial function under the Small Estate or similar statute, who are normally not even expected to follow the strict rule of court form and procedure. One's submission may not be of use to oneself, although if again the bench is prepared to assist it could by taking it down help the counsel to know what he had actually said which standing and speaking at the same time he would not invariably be able to do. And to one with a good memory it would be of value in seeing whether the Bench had correctly quoted counsel on the basis of which he might have made his decision. In this way counsel could also assist the appeal court by limiting the area of his disagreement with the court below. Under English practice a County Court Judge should take the notes of the contentions of the parties and of the facts upon which those contentions are based and of the evidence relating thereto as will enable the Court of Appeal to decide the matter. This is so even though there is no statutory duty for him to do so. Where notes have been taken counsel are entitled to them for use at the hearing of the appeal whether a notice of appeal had been served or not (see *Halsbury's* Notes at page 325 Vol. 9 3rd Edn.).

There seems to be no procedure here by which the President's or the Magistrate's notes could be had except to call for the notes of evidence and expect them to be included therein. In the circumstances, I feel, the notes of evidence must be defined here as to include the parties' contentions or submissions and the facts upon which these are based. One cannot lose sight of the fact that one of the essential purpose if not requirement of an appeal is that the parties and counsel alike should be placed in a position as to be able to present their case as fully and effectively as possible and this object would naturally be defeated and cut down and hence justice denied if the Presiding Officer should seek to dismember part or parts of the usual record and essential part at that, against the wish or wishes of the party or parties concerned.

In my humble view valuable time and precious effort all round had been wasted if only because the learned President had been insensible enough as not

to make himself realise that in as much as he had the right to deny the applicant to see his own submission and the President's oral grounds for the purpose of filing his appeal, so was the applicant's right to ask for the notes of evidence on filing his appeal. This is a right which is given to him under the law and which no one can take away. And it seems to me that for the purpose of asserting that entrenched right it is quite irrelevant that he had in fact been supplied with the notes before, he was entitled to them however superfluous and redundant they may be, unless it is clearly seen that he has chosen to waive that right. And for the purpose of asserting that right it seems to me quite irrelevant that the real reason for wanting the notes is other than for the purpose of preparing his appeal. But has he chosen to waive that right, expressly or impliedly? It was argued, in effect, by counsel that he had impliedly done so by the very fact of his accepting them before, during the course of the trial. And also, by his own agreement with the Registrar to exclude them, after the trial. As far as the agreement was concerned surely it must have been its term that the applicant's abstinence from asking for the notes was conditional on the Registrar or the President supplying him with what he wanted during the time specified by him and if therefore they had failed to do so then they had simply failed to discharge their part of the bargain and since he was still willing to do his, then the contract, if there was one, was discharged and his full rights had clearly been restored. And it certainly cannot be said that the agreement overrides the law when, to say the least, the agreement had been implemented in such a manner as to seek to deprive the applicant's right under the law. As to his acceptance of the notes during the course of the trial, it does not seem to stand to reason that he is deemed to have impliedly waived his right when evidently the President had not made it clear to him what his true legal rights were in so far as the giving of the notes was concerned. He must, if not in fairness to him, at least in view of the fact that he was going to make what seemed to him a salutary departure from the hitherto normal accepted practice, have made it clearly and categorically known to the applicant at the trial firstly, that since the giving of the notes was strictly within the prerogative of the court that he would agree to give them only if the parties would not ask for them again should they appeal. And secondly, that the giving of the notes would not include matters which he considers ancillary to them such as the submissions and the oral judgment. There is nothing, however, in the affidavit or the counsel's submission to show that the learned President had done or attempted to do this for which the applicant would now be estopped from recalling the concession which he had earlier made. To show that it is essential that the person who is going to lose his right should fully appreciate and understand his true legal position, reference may be made to the case of *Chapman* v. *Michaelson*.[1] There a scheme of arrangement approved by the court had been entered into between a bankrupt one called Lloyd and his creditors whereby his property was to be realised in payment of his debts. One of the creditors of the said Lloyd had had a contingent life interest under a will mortgaged to him as security for Lloyd's debt. It turned out later that the deed under which the mortgage was executed was illegal and void without the true legal position being appreciated by Lloyd. An action was taken by his trustee to declare the document illegal and void and the court held it would do so. It was argued against the declaration that Lloyd being in a position to avail himself of the fact that this transaction was illegal by statute elected as he was entitled to do not to raise that point, elected to treat the security as one binding on him and placed the trustee in possession of his property upon a trust which recognised the validity of the security and which really estopped Lloyd or his trustee from suggesting that the security was illegal and void. But this was what Eve J. said in answer:

> "Did the execution, or did the putting forward by Lloyd of this scheme of arrangement, and the adoption of it, or the ratification and approval of it by the court, operate to estop Lloyd or his trustee from raising this question? It seems to me that at the root of that lies the question whether Lloyd was in a position, at the date when this scheme was put forward, and when these trusts were created, to appreciate what his true legal rights were."

With that note I think it is enough for me to say that in my view the applicant had not by his conduct sought to waive or agreed to waive his right to the notes of evidence on filing his appeal. Since therefore he had not lost his right and the notes were not made available to him since filing his notice then the time for filing his petition had not lapsed and the question of extending the time for him to do so consequently did not arise. He may therefore proceed now to file his appeal in the usual manner but if he should decide to dispense with the notes (which I expect from the circumstances now that he would) then he shall file his petition within 10 days from the date a registered letter is posted to the President or the Registrar stating that he is filing his petition as ordered by the court within ten days from the date of posting the letter.

I would therefore make the order accordingly.

Order accordingly.

Solicitors: *Joseph & Sons; Lee & Co.; Dato' Bijaya & Co.*